IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.8323 OF 2006

Dr.Sresh Nivruti Patil ..Petitioner

Vs.

Shri Ganpat Namdeo Dhas ..Respondents

Mr.Pratap Patil for the petitioner

Miss P.P.Tendulkar for the respondent no.1

CORAM : A.P.DESHPANDE, J

DATED : 19TH DECEMBER, 2006

P.C.:

1. Rule. Rule made returnable forthwith. Taken up for final hearing by consent of the parties.

2. The petitioner is the original plaintiff who has instituted a suit for perpetual injunction seeking to restrain the respondent / defendant from obstructing the construction of the staircase so also from restraining the defendant from demolishing or damaging the staircase. The defendant has made a counter claim based on

easementary rights with a view to restrain the plaintiff from opening doors and windows. At a later point of time, the respondent moved an application for amendment of the written statement. Most of the said amendment goes to elaborate and clarify the case touching the defendants claim to easementary rights. However, only one sentence which is objected to by the petitioner is in regard to alleged encroachment made by the plaintiff on the land by the defendant.

3. In the submission by the learned counsel for the plaintiff, initially in the written statement (counter claim) what was claimed was only easementary right and for the first time, by an amendment application the case of encroachment is made out. Hence, the proposed amendment changes the nature of the suit which obviously affects the interest of the plaintiff. There is no serious change to the other part of the amendment application being granted. The learned counsel for the respondent submits that there is no prayer made for removal of encroachment and for possession. Thus, the statement made in the amendment

application is not really in relation to the encroachment but it is in furtherance of the case of asserting easementary rights. In the written statement, no case in regard to the encroachment by the plaintiff was made out and such a plea cannot be permitted to be raised by an amendment application.

4. In the result, though the trial court is justified in allowing most of the amendment application to the extent it permits the making of averment that the plaintiff has encroached on the land of the defendant, the same cannot be permitted. The impugned order passed by the trial court to that extent needs to be modified. Thus, amendment to the extent of allegations about plaintiff having encroached on the defendants land is concerned, the same is rejected. Rest of the order to hold the filed. Rule made absolute in above terms with no orders as to costs.

(SHRI A.P.DESHPANDE, J)